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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941 .

Nos. 819 and 820 7-8

In the Matter

of

THE WESTERN PACIFIC RAILROAD COMPANY,

Debtor.

FREDERICK H. ECKER, et al.,

Petitioners.

against

WESTERN PACIFIC RAILROAD CORPORATION, et al.,

Respondents.

CROCKER FIRST NATIONAL BANK OF SAN FRANCISCO, et al.,

Petitioners.

against

WESTERN PACIFIC RAILROAD CORPORATION, et al.,

Respondents.

**Motion of Irving Trust Company, Refunding Mortgage
Trustee, to Defer Consideration of Petitions for
Writs of Certiorari and Extend Time to
File Brief in Answer to Same**

January 16, 1942.

HAROLD C. McCOLLOM,
Counsel for Irving Trust Company, as Sub-
stituted Trustee under the General and
Refunding Mortgage of the Western
Pacific Railroad Company:

FRANCIS R. KIRKHAM,
ORRIN G. JUDD,

Of Counsel.

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Now comes Irving Trust Company, as Substituted
Trustee (hereinafter termed the Refunding Mortgage

Trustee) under the General and Refunding Mortgage of the Debtor, dated as of January 1, 1932, one of the respondents in the above-captioned cases, and respectfully moves that this Honorable Court defer consideration of the above-captioned petitions for certiorari until after the decision by the Circuit Court of Appeals for the Ninth Judicial Circuit of petitions for rehearing of the decision to which said petitions for certiorari are directed, and that this Court extend the time of the Refunding Mortgage Trustee to file its brief in answer to such petitions for certiorari until twenty (20) days after the decision of its said petition for rehearing.

The facts on which this motion is based are as follows:

The two petitions referred to in the caption, one filed by a Committee for Institutional Holders of First Mortgage bonds of the Debtor, and the other by the Trustees of the First Mortgage of the Debtor, both relate to the same decree of the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and each raises substantially the same questions as the other.

The opinion of the Circuit Court of Appeals, which is the subject-matter of the petitions, was rendered on November 28, 1941. On December 22, 1941, and within the time limited by the Rules (Rule 25) of said Circuit Court of Appeals, the Refunding Mortgage Trustee filed in the Circuit Court of Appeals its petition for rehearing.

The petitions for certiorari were not served upon counsel or filed until December 29, 1941.

Meanwhile the Debtor, on or about December 29, also filed with the Circuit Court of Appeals a petition for rehearing.

This is a proceeding under Section 77 of the Bankruptcy Act for the reorganization of a railroad.

The decree of the Circuit Court of Appeals reverses an order of the District Court which approved a plan of reorganization certified to it by the Interstate Commerce Commission.

One of the purposes of the Refunding Mortgage Trustee's petition for rehearing was to obtain a determination of the lien issues which it had raised as an appellant in that Court, and which, as stated in the First Mortgage Trustees' petition for certiorari (No. 820, p. 6) "were before the Circuit Court of Appeals but as to which the Circuit Court of Appeals made no specific determination."

The position of the Refunding Mortgage Trustee

There are outstanding \$18,999,500 of bonds issued under the Debtor's General and Refunding Mortgage (R. 4053), all of which are pledged as collateral with three creditors, the A. C. James Company, Railroad Credit Corporation, and Reconstruction Finance Corporation (all of whom are parties to the proceeding).

Throughout the proceedings in the Interstate Commerce Commission, and in the courts below, the pledgees of such bonds and all other parties to the proceedings recognized that the Refunding Mortgage Trustee was the appropriate party to present questions of conflicting lien between the Refunding Mortgage and the so-called First Mortgage (R. 911, 961, 1631, 1644; I.C.C. Min. 477, 550-51).

In the District Court the Refunding Mortgage Trustee asserted in its objections to the Plan (R. 974-82) that the Interstate Commerce Commission's plan was based upon an erroneous assumption as to the respective liens of the two mortgages. The District Court having

adopted the Interstate Commerce Commission's views concerning lien (R. 1597), the Refunding Mortgage Trustee appealed from the order approving the Plan. Although the Refunding Mortgage Trustee was fully heard in the Circuit Court of Appeals without objection by any party, and although the two pledgees of Refunding Mortgage bonds who had also appealed relied on the Trustee's arguments with respect to the lien questions, the Circuit Court of Appeals in its opinion determined that the Refunding Mortgage Trustee was not entitled to appeal, and dismissed its appeal (R. 2668), leaving all the questions of conflicting lien undetermined.

The Refunding Mortgage Trustee's petition for rehearing urges as its first point that the Trustee was a proper party appellant; both as the only proper party to enforce or protect the lien of the mortgage, entitled to be heard under the specific provisions contained in Section 77(c)(13) of the Bankruptcy Act, and also as the Trustee of an express trust to enforce the direct obligations of the mortgagor; and that the Circuit Court of Appeals, in dismissing the appeal without the benefit of argument or brief on the question of the Trustee's standing, disregarded controlling authorities and pertinent facts.

The second point of the Refunding Mortgage Trustee's petition for rehearing is that decision of the lien questions by the Circuit Court of Appeals is necessary in order for the Commission to make the findings which that Court's opinion requires with respect to the value of "(1) the property subject to the Refunding Mortgage only and (2) the property subject both to the Refunding Mortgage and to the First Mortgage" (R. 2670).

The nature of any brief which the Refunding Mortgage Trustee may wish to submit in answer to the petitions for certiorari will be affected by the action which the Circuit Court of Appeals takes on its pending petition for rehearing, both with respect to its standing as an appellant and its contentions as to lien. Consequently it is desirable that the filing of a formal answer by this respondent to the certiorari petitions be postponed until the petitions for rehearing have been decided.

The lien questions

If the Refunding Mortgage is a prior lien on the properties to which the Refunding Mortgage Trustee lays claim it is not disputed that the reorganization plan is unfair to the creditors secured by Refunding Mortgage bonds. The matters in controversy are important and of great value.

The first issue of lien relates to rolling stock acquired under conditional sale or equipment-trust agreements, in which the Debtor had an equity at the date of institution of the proceedings of over \$6,000,000 (R. 1074). The Refunding Mortgage Trustee contends that the granting clauses of the First Mortgage expressly exclude this equipment from the property subject to its lien; and that it is expressly made subject to the lien of the Refunding Mortgage. The Commission based its plan on the assumption that the First Mortgage covered this equipment, although stating that final adjudication of the lien questions must be made by the Court (R. 262).

The second question relates to the lien of the General and Refunding Mortgage on the Debtor's Northern California Extension. This Extension was completed in 1932 at a cost of over \$10,000,000, and has proved to be

one of the most valuable parts of the Debtor's system. The Refunding Mortgage Trustee claims that the Extension is subject to the lien of the First Mortgage only to the extent of the First Mortgage bonds (\$5,000,000 principal amount) used in the construction thereof and that otherwise it is subject, under the facts appearing in the Record, to the *pari passu* lien of the General and Refunding Mortgage, inasmuch as the moneys for the completion of the Extension were supplied by the Refunding Mortgage creditors.

The third question relates to non-carrier real estate of a book value of approximately \$1,850,000, which the Refunding Mortgagee contends is free from both the First Mortgage and the Refunding Mortgage and must be given consideration in the allocation of securities to the Refunding Mortgage creditors in the event it is found that they are not fully secured.

None of these questions was passed on by the Circuit Court of Appeals.

A fourth question was presented to that Court, relating to the amount of securities that should be issued to the Refunding Mortgage creditors in recognition of their undisputed first lien on pledged securities of Alameda Belt Line and Central California Traction Company. Since the Circuit Court of Appeals' opinion requires the Interstate Commerce Commission to find the value of the property subject to the General and Refunding Mortgage (R. 2670), including these securities, and since the lien on these securities is conceded by all parties, the petition for rehearing did not touch this fourth question.

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**Decision of the lien questions is necessary in
connection with any reorganization plan**

The Commission, in promulgating its Plan, recognized in respect of the lien questions that "final adjudication of this and similar questions must be made by the Court" (R. 262). Obviously the decision of legal questions relating to the lien on over \$12,000,000 of property has an important bearing on the fairness of any reorganization plan. Under this Court's decision in the *Consolidated Rock Products* case (312 U. S. 510, 520) one of the fundamental questions in connection with any reorganization plan is the "determination of what assets are subject to the payment of the respective claims".

One of the petitions to this Court recognizes this fact. The petition of the First Mortgage Trustees (No. 820, pp. 9-10), states "the decision of the Circuit Court of Appeals has left unanswered many important questions, affecting virtually every feature of the Commission Plan. An authoritative determination of all of these questions is essential to the final approval of a plan of reorganization".

The Refunding Mortgage Trustee's petition for rehearing is designed to expedite the ultimate decision of the case, by obtaining a ruling from the Circuit Court of Appeals on questions which were fully argued before the Circuit Court of Appeals and which this Court, if it should grant certiorari, might decline to pass on until they had first been determined by the Circuit Court of Appeals.

Cf. *Grant v. Leach & Co.*, 280 U. S. 351;

Lutcher & Moore Lumber Co. v. Knight, 217
U. S. 257, 267;

Brown v. Fletcher, 237 U. S. 583, 587;

District of Columbia v. Murphy, 86 L. Ed. 277,
285 (Dec. 15, 1941).

With respect to the petitions

Although the lien questions have not been decided by the Circuit Court of Appeals and are not directly brought in issue by the petitions to this Court, there are certain statements in those petitions which should be corrected.

The First Mortgage Trustees assert (No. 820, Petition pp. 4-5, 7, Brief p. 17) that the Circuit Court of Appeals' opinion requires allocation of new securities to secured creditor "in accordance with a precise mathematical formula based upon exact dollar values" instead of upon the "equitable equivalent of the assets available for the satisfaction" of their respective claims. We do not so read the Circuit Court of Appeals' opinion. What the opinion holds is that the Court is not in a position to exercise an "informed, independent judgment" (R. 2671) concerning the equitable equivalent of the assets securing the two issues of bonds without knowing the value of those assets; and it directs that such value be fixed.

The Committee argues (p. 15 of Petition in No. 819) that such senior securities as were allotted to the Refunding Mortgage bondholders constitute adequate recognition of their aggregate rights by reason of their admitted first lien on securities of Tidewater Southern Railway Company, Central California Traction Company and Alameda Belt Line. The Commission stated that the lien on the latter two items "has no material value" (R. 314-15), but it did not make any finding with respect to the actual values of either of such properties, both of which are important feeders, producing together over \$500,000 per year of traffic for the Debtor (R. 110, 203, 1312-13).

An analysis of the Commission's Plan shows very plainly that it makes no allowance for the Central Cali-

ifornia Traction or Alameda Belt Line securities. It awarded to the Refunding Mortgage bondholders, by its supplemental report, \$732,010 of new income mortgage bonds and \$1,147,955 par value of new participating preferred stock (R. 315). The amount of such income bonds was exactly equal to the sum of (R. 313):

1. The amount of cash in the hands of the Refunding Mortgage Trustee.....	\$223,732.00
and	
2. The face amount of the note of Tidewater Southern Railway Company, pledged with the Refunding Mortgage Trustee, on which interest is being currently paid at the rate of 5% per annum	508,278.00
Total.....	\$732,010.00

The Commission made no finding that the new income bonds were worth par (which would seem to be the only justification for allotting income bonds in exchange for cash) nor did it make any finding concerning the value of the Tidewater Southern note.

The amount of preferred stock allocated to the Refunding Mortgage bondholders was exactly equal to the par value (\$1,147,955) of the stock of Tidewater Southern Railway Company pledged with the Refunding Mortgage Trustee (R. 313). There was no finding concerning the value of the Tidewater Southern stock, although the record showed that its rate-making value was substantially greater than its par value (R. 314), and that its net earnings represent approximately 7% of the total system earnings (R. 1065, 1098)—as compared with its rate-making valuation, referred to by the Committee (p. 15 of

Petition in No. 819), which was 1.3% of the comparable system valuation.

We submit, therefore, that the Circuit Court of Appeals was correct, at least insofar as the relative rights of mortgage creditors are concerned, in holding that the Commission had not furnished to the District Court adequate information on which to determine that the new securities allotted to the Refunding Mortgage bondholders represented an equitable equivalent of the property on which the Refunding Mortgage was admittedly a first lien.

The effect of the Refunding Mortgage Trustee's petition for rehearing

This Court has previously held that an appeal will not lie until after the disposition of petitions for rehearing.

Cherokee Nation v. Whitmire, 223 U. S. 108;

Foorhees v. Noye Manufacturing Co., 151 U. S. 135;

Wolf Packing Co. v. Industrial Court, 267 U. S. 552.

Whether or not these cases are strictly applicable to petitions for certiorari, we submit that it is desirable in the present circumstances to defer action upon the petitions for certiorari until the Circuit Court of Appeals has had an opportunity to decide the petitions for rehearing which have been filed with it.

For the foregoing reasons, this respondent respectfully prays that this Court defer consideration of the petitions for certiorari until after the Circuit Court of Appeals shall have acted on the petitions for rehearing.

which are pending before it, and that this Court extend the time of this respondent to file its brief in answer to such petitions for certiorari until twenty (20) days after the decision of its petition for rehearing; or in the alternative, if this respondent's motion to defer consideration of such petitions for certiorari be denied, then that this respondent's time within which to file its brief in answer to such petitions shall be extended to a date ten (10) days from the date of such denial.

January 16, 1942.

Respectfully submitted,

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*Counsel for Irving Trust Company, as
Substituted Trustee under the General
and Refunding Mortgage of the West-
ern Pacific Railroad Company.*

FRANCIS R. KIRKHAM,

ORRIN G. JUDG,

Of Counsel.